

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, *et al.*,

Plaintiffs,

v.

FIRST DATA CORPORATION and
CONCORD EFS, INC.,

Defendants.

CASE NUMBER: 1:03CV02169

JUDGE: Hon. Rosemary M. Collyer

FILED: May 7, 2004

RESPONSE TO PUBLIC COMMENTS

Pursuant to the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h) ("Tunney Act"), the United States files the comments of the public concerning the proposed Final Judgment in this case and the United States' responses to those comments. After careful consideration of the comments, the United States continues to believe that the proposed Final Judgment will provide an effective and appropriate remedy for the antitrust violation alleged in the Complaint. The United States will move the Court to enter the proposed Final Judgment after the public comments and this Response have been published in the Federal Register, pursuant to 15 U.S.C. § 16(d).

I. BACKGROUND

On October 23, 2003, plaintiffs the United States and the states of Connecticut, Illinois, Louisiana, Massachusetts, New York, Ohio, Pennsylvania, and Texas, and the District of

Columbia (collectively “Plaintiff States”) filed a Complaint alleging that the proposed acquisition of Concord EFS, Inc. (“Concord”) by First Data Corporation (“First Data”) would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18. The Complaint alleged that First Data’s acquisition of Concord would substantially reduce competition in the market for PIN debit network services by combining the STAR and NYCE point-of-sale PIN debit networks.¹ Concord’s STAR network is the largest PIN debit network in the United States, currently switching approximately half of all U.S. PIN debit transactions. NYCE is the third-largest PIN debit network. First Data owns a 64 percent controlling interest in NYCE. The transaction would have eliminated the competition between STAR and NYCE, leading to higher prices for PIN debit network services to merchant customers. Merchants would have passed on at least some of the higher costs of PIN debit transactions by raising the prices of their goods and services, to the detriment of tens of millions of consumers throughout the United States.

On December 15, 2003, the United States, the Plaintiff States and the Defendants filed a proposed Final Judgment and Hold Separate Stipulation and Order. On January 9, 2004, the parties, by consent, filed an Amended Hold Separate Stipulation and Order. The proposed Final Judgment requires First Data, within 150 calendar days after the Court’s signing of the original Hold Separate Stipulation and Order, or five days after notice of the entry of the Final Judgment by the Court, whichever is later, to divest all of its governance rights in NYCE and its entire 64

¹ PIN debit networks are the telecommunications and payment infrastructure that connects merchants to consumers’ demand deposit accounts at banks. These networks enable consumers to purchase goods and services from merchants through PIN debit transactions by swiping their bank card at a merchant’s terminal and entering a Personal Identification Number, or PIN. Within seconds, the purchase amount is debited from the customer’s bank account and transferred to the retailer’s bank.

percent ownership interest in NYCE (collectively "NYCE Holdings"). In addition, the Amended Hold Separate Stipulation and Order requires First Data to take certain steps to ensure that NYCE is operated as a competitively independent, economically viable and ongoing business concern that will remain independent and uninfluenced by the consummation of the acquisition, and that competition is maintained during the pendency of the ordered divestiture.

The United States, the Plaintiff States and the Defendants have stipulated that the proposed Final Judgment may be entered after compliance with the Tunney Act. Entry of the proposed Final Judgment would terminate this action, except that the Court would retain jurisdiction to construe, modify or enforce the provisions of the proposed Final Judgment and to punish violations thereof.

Pursuant to the requirements of the Tunney Act, the United States filed a Competitive Impact Statement ("CIS") on January 23, 2004, and published the proposed Final Judgment and the CIS in the Federal Register on February 10, 2004. A summary of the terms of the proposed Final Judgment and CIS, with directions for the submission of written comments relating to the proposed Final Judgment, were published in the Washington Post for seven days on February 6, through February 12, 2004. The sixty-day period for public comments, during which the two comments described below were received, expired on April 12, 2004.

II. RESPONSE TO PUBLIC COMMENTS

A. Legal Standard Governing the Court's Public Interest Determination

Upon publishing the public comments and this Response, the United States will have fully complied with the Tunney Act. After receiving the motion of the United States for entry of the proposed Final Judgment, the Tunney Act directs the Court to determine whether entry of the proposed Final Judgment "is in the public interest." 15 U.S.C. § 16(e). In making that determination, "the court's function is not to determine whether the resulting array of rights and liabilities is one that will best serve society, but only to confirm that the resulting settlement is within the reaches of the public interest." *United States v. W. Elec. Co.*, 993 F.2d 1572, 1576 (D.C. Cir. 1993) (citations and emphasis omitted). The Court should evaluate the relief set forth in the proposed Final Judgment and should enter the Judgment if it falls within the government's "rather broad discretion to settle with the defendant within the reaches of the public interest." *United States v. Microsoft Corp.*, 56 F.3d 1448, 1461 (D.C. Cir. 1995); accord *United States v. Associated Milk Producers, Inc.*, 534 F.2d 113, 117-18 (8th Cir. 1976). The Court should review the proposed Final Judgment "in light of the violations charged in the complaint and . . . withhold approval only [(a)] if any of the terms appear ambiguous, [(b)] if the enforcement mechanism is inadequate, [(c)] if third parties will be positively injured, or [(d)] if the decree otherwise makes a 'mockery of judicial power.'" *Mass. Sch. of Law at Andover, Inc. v. United States*, 118 F.3d 776, 783 (D.C. Cir. 1997) (quoting *Microsoft*, 56 F.3d at 1462).

Because "[t]he court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place" it follows that "the

court is only authorized to review the decree itself," and not to "effectively redraft the complaint" to inquire into other matters the United States might have, but did not, pursue. *Microsoft*, 56 F.3d at 1459-60. The Tunney Act does not empower the Court to reject the remedies in the proposed Final Judgment based on the belief that "other remedies were preferable," *Id.* at 1460, nor does it give the Court authority to impose different terms on the parties. *See, e.g., United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 153 n.95 (D.D.C. 1982); *accord* H.R. Rep. No. 93-1463 (1974). Further, the United States is entitled to "due respect" concerning its "prediction as to the effect of proposed remedies, its perception of the market structure, and its view of the nature of the case." *United States v. Archer-Daniels-Midland Co.*, 272 F. Supp. 2d 1, 6 (D.D.C. 2003) (*citing Microsoft*, 56 F.3d at 1461).

B. Summary of Public Comments and the United States' Responses

The United States received comments from the Citizens for Voluntary Trade ("CVT") (Exhibit 1) and Ryco, Ltd. (Exhibit 2) in response to its publication of the Final Judgment in the Federal Register.

1. CVT

CVT's comment states that the United States incorrectly alleged in the Complaint that there is a relevant product market for PIN debit network services. The comment maintains that PIN debit network services are part of a broader product market that includes all demand forms of payment, including signature debit network services, cash, checks, money orders, and traveler's checks. CVT concludes that because NYCE and STAR compete in a broader market, combining the two networks does not threaten competition and, therefore, entering the Final Judgment does not serve the public interest.

CVT's comment is directed at whether the United States should have filed this case, not to whether the relief in the proposed Final Judgment is adequate to address the harm alleged in the Complaint. Comments challenging the validity of the United States' case, or alleging that it should not have been brought, are challenges to the initial exercise of the United States' prosecutorial discretion and are outside the scope of the Tunney Act proceeding. The purpose of this proceeding is not to evaluate the merits of the United States' case. A Tunney Act proceeding is not an opportunity for a "de novo determination of facts and issues," but rather "to determine whether the Department of Justice's explanations were reasonable under the circumstances" because "[t]he balancing of competing social and political interests affected by a proposed antitrust decree must be left, in the first instance, to the discretion of the Attorney General." *United States v. W. Elec. Co.*, 993 F.2d at 1577 (citations omitted). Consequently, the courts consistently have refused to consider "contentions going to the merits of the underlying claims and defenses." *United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir. 1981); *accord United States v. Thomson Corp.*, 949 F. Supp. 907, 913 (D.D.C. 1996) ("[T]he court is to compare the complaint filed by the government with the proposed consent decree and determine whether the remedies negotiated between the parties and proposed by the Justice Department clearly and effectively address the anticompetitive harms initially identified."). Thus, CVT's challenge to the merits of the United States' underlying case are beyond the purview of appropriate Tunney Act inquiry.

Nevertheless, in response to CVT's comment, the United States observes that it conducted an extensive and thorough investigation into the provision of PIN debit network services, including to what extent these services potentially competed with other products or

services. The facts found by the investigation demonstrated that PIN debit network services are a relevant product market under the antitrust laws. Many merchants strongly prefer PIN debit network services because PIN debit network services offer substantial advantages that set them apart from other forms of demand payment, most notably from the closest potential substitute, signature debit network services.² First, PIN debit networks generally charge merchants considerably lower prices than those offered by signature debit networks. Second, PIN debit networks provide a more secure method of payment than signature debit networks because it is easier to forge a person's signature than to obtain an individual's PIN. Consequently, fraud rates, and the expenses imposed by such fraud, are generally lower for PIN debit network services than for signature debit. The greater security provided by PIN debit networks also typically eliminates the need for costly charge-back procedures that allow consumers to challenge signature debit transactions. Third, PIN debit transactions also generally settle instantaneously, guaranteeing the merchant ready access to its receipts, while signature debit transactions often take one or two days to settle. Finally, PIN debit networks usually enable shorter times at the check-out counter than signature debit networks, further reducing merchants' costs.

Merchant preference for PIN debit network services over other forms of demand payment, including signature debit transactions, cash, money orders, and travelers checks, is further strengthened by the strong demand of many consumers to use PIN debit network services, particularly at supermarkets, mass merchandisers and drug stores. Many consumers value the security and speed of PIN debit transactions, as well as the unique "cash back" feature that allows

² Signature debit networks are telecommunications and payment infrastructure that enable consumers to purchase goods and services by swiping a debit card and then signing for the transaction as the means of authentication.

them to receive cash at the register when making a purchase. Consumers cannot receive cash back when making a signature debit purchase. Today, consumers request cash back in approximately twenty percent of all PIN debit transactions. Because of their generally substantial lower costs and superior features, the United States determined that a small but significant increase in the price of PIN debit network services would not cause a sufficient number of merchants to stop accepting PIN debit transactions, or to discourage their customers from executing such transactions, to defeat the price increase. Based on this finding, the United States concluded, and properly alleged in its Complaint, that PIN debit network services is a relevant antitrust product market.

2. Ryco's Comment

Ryco is an independent gas station and convenience store that does business under the trade name "Hansen's Good to Go." Ryco's comment states that it objects to the merger of First Data and Concord because Concord currently engages in alleged anticompetitive behavior. The comment maintains that Concord provides Ryco and other merchant customers with poor customer service by double-charging them on some bills, routing some transactions to more expensive networks, and negotiating unfavorable terms in its contracts concerning the forums for litigating contractual disputes and the parties' responsibilities for "fees" and "costs" that result from such litigation. Ryco believes that the merger will increase the number of merchants to which Concord provides debit card transaction related services and, consequently, will increase Concord's leverage to provide poor customer service. Ryco advocates conditioning approval of the merger on (a) revisions to the choice of forum and attorneys' fees provisions in Concord's contracts, and (b) improvements in Concord's customer service.

Ryco's concerns do not indicate that the proposed Final Judgment is not in the public interest. To the extent that Ryco's concerns are directed to the provision of PIN debit network services, the Final Judgment's requirement that First Data divest NYCE is a fully adequate remedy. Preventing the combination of STAR and NYCE maintains the competitive structure of the PIN debit network services market that existed at the time First Data and Concord decided to merge.

Ryco also appears to be concerned about the merger's potential impact on at least two other types of services, merchant processing and acquiring services for credit and debit card transactions. These concerns are not a proper focus for the Tunney Act proceeding because they were not the subject of the Complaint. The Complaint alleged that First Data's acquisition of Concord would reduce competition *only* in the PIN debit network services market. As explained, Tunney Act review may not "reach beyond the complaint to evaluate claims that the government did *not* make and to inquire as to why they were not made." *Microsoft*, 56 F.3d at 1459. *See also Archer-Daniels-Midland Co.*, 272 F. Supp. 2d at 6-7, 9 (rejecting argument that court should consider effects in markets other than those raised in the complaint); *United States v. Pearson PLC*, 55 F. Supp. 2d 43, 45 (D.D.C. 1999) (a court should not "base its public interest determination on antitrust concerns in markets other than those alleged in the government's complaint") (citation omitted). Therefore, Ryco's apparent concerns about the merger's impact on merchant processing and acquiring services provides no basis for the Court to reject the proposed Final Judgment.

III. Conclusion

The CIS and this Response of the United States to the public comments demonstrate that the proposed Final Judgment is in the public interest. Accordingly, pursuant to Section 16(d) of the Tunney Act, after these comments and this Response are published in the Federal Register, the United States will move this Court to enter the Proposed Final Judgment.

Dated May 7, 2004.

Respectfully submitted,

_____/s/_____
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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing Response to Public Comments was served on the following counsel, by electronic mail in PDF format, on May 7, 2004:

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